

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

restriction (MPEP 803). Further, requirements to restrict should have two aspects: (1) the reasons why the inventions are independent/distinct, and (2) reasons for insisting upon restriction (MPEP 808).

Burden for Restriction Not Met.

The election of species is traversed, as the burden required for such an election has not been met.

A requirement for an election of species requires a showing that the species at issue are independent and distinct.<sup>1</sup> Such a showing is not discretionary, but mandatory. Examiners must provide reasons and/or examples to support conclusions.<sup>2</sup>

In the present case, the rejection has simply recited two alleged species without an indication as to what makes the species independent or distinct, as required. Without the presentation of reasons and/or examples, as required, the Examiner's burden for requiring an election has not been met – and thus the requirement is traversed.

Restriction Improper

In addition, or alternatively, Applicant respectfully requests that the restriction requirement be withdrawn, as it is improper. First, the restriction requirement defines species by claims.<sup>3</sup> This is improper. Claims are never species.<sup>4</sup> Second, the restriction requirement incorrectly identifies species. The restriction requirement identifies Applicant's figures 1 and 2 as showing a method of forming an "electrically erasable programmable read only memory (EEPROM)." This is incorrect, and thus unduly limits Applicant's claims.<sup>5</sup>

<sup>1</sup> See MPEP §803, §806.04 (for independence of species), and §806.04(b) for distinctness of species.

<sup>2</sup> See MPEP §803.

<sup>3</sup> See the Office Action, dated 8/27/2002, Page 2, Lines 3 and 4, which defines Species I as claims 1-6 and Species II as claims 7-20.

<sup>4</sup> MPEP §806.04(e).

<sup>5</sup> See the Specification, Page 9, Lines 1-2, which describes FIG. 1 as showing a method of forming a series of semiconductor device layers.

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Request for Reconsideration.

For all of the above reasons, Applicant respectfully requests a reconsideration of the election requirement pursuant to CFR §1.143, to thereby enable immediate petition on this matter.

It is believed that the requirements for restriction have been traversed and the application may now be examined on the merits. Such action is respectfully requested.

Respectfully Submitted,

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Response to Office Action - Page 3 of 3